91-895

Supreme Court, U.S.
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NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

TALMADGE W. HAYES, PETITIONER

v.

COMMUNITY GENERAL OSTEOPATHIC HOSPITAL

ON WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

1. Does Section 1981 of the Civil Right Act, 42 U.S.C. Section 1981, provide a cause of action for racially motivated discharge?

2. Should not a heightened scrutiny apply to appellate review of the findings of fact in a discrimination case where the Trial Judge ignored the unanimous conclusion reached by the advisory jury which he impaneled sua sponte and instead adopted verbatim the proposed findings of the Defendant where there is reason to doubt they represent the judge's own considered conclusion?

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STATUTES

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. 2,5,7

Section 1981 of the Civil Rights Act, 42 U.S.C. §1981. . . . . 2,5,7,8, 9,10,14, 15,16

OPINIONS BELOW

Hayes v. Community General Osteopathic Hospital and Bert McBrayer, 730 F.Supp. 1333 (M.D. Pa. 1990)[1]

Hayes v. Community General Osteopathic Hospital and Bert McBrayer, No. 90-5984 (3rd Cir. 1991, unpublished)

[1] Bert McBrayer was a Defendant below. Action is no longer sought against this Defendant.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION IS INVOKED

Petitioner, Talmadge Hayes, requests for Writ of Certiorari to issue to review the judgment of the United States Court of Appeals for the Third Circuit, issued on August 8, 1991, wherein the court upheld the decision of the U.S. District Court for the Middle District of Pennsylvania. Petitioner requests this Court to consider and rule that victims of racially motivated employment terminations are protected under 42 U.S.C. Section 1981 in light of this Court's holding in Patterson v. McLean Credit Union, 491 U.S. 164, 109 S.Ct. 2363 (1989).

Petitioner further requests that this Court clarify its decision in Anderson v. City of Bessemer City, 470 U.S. 564, 105 S.Ct. 1504 (1985) and rule that a heightened scope of review is required where a trial judge adopts verbatim the

findings of fact proposed by one party and there is reason to doubt that they represent the considered conclusions of the trial judge.

Discretionary Jurisdiction rests with this Court pursuant to 28 U.S.C. §1254.

STATUTES

42 U.S.C. §2000e-2 Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practice for an employer --

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. §1981 Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State or Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

Talmadge W. Hayes, a black male, was employed by the Defendant, Community General Osteopathic Hospital (CGOH) for nineteen (19) years. On the morning of April 25, 1988, Mr. Hayes called his employer to request a personal day off of work. He spoke first to his secretary and then to his supervisor, Bert McBrayer, and explained that he would not be in as scheduled. The following day, when Mr. Hayes returned to work, he was questioned by Mr. McBrayer regarding the cause of his absence.

According to Mr. Hayes, he explained to Mr. McBrayer that his car had been towed and repaired in the Philadelphia area. When Mr. McBrayer asked for receipts, Mr. Hayes explained that a relative had fixed the car. Mr. Hayes inquired of Mr. McBrayer why he was being questioned in this fashion, to which Mr. McBrayer responded "You people have a pattern for Mondays."

At trial, Mr. McBrayer denied making this statement. The Defendant argued that Mr. Hayes was fired for lying to his supervisor, the lie being the reason why he took a personal day off. The Defendant contended Hayes admitted to his supervisor that he lied and further alleged that it suspected the real reason Hayes did not report to work was because he was intoxicated.

At trial, Mr. Hayes denied that he lied to his supervisor about his reason for taking a personal day of leave, denied that he admitted he had lied to his supervisor and further argued that firing an employee with nineteen (19) years seniority for lying about his reasons for taking a personal day was a pretext for discrimination.

Mr. Hayes filed a claim for relief under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e) et seq. and under 42 U.S.C. §1981, alleging wrongful termination of his employment and wrongful denial of access to grievance procedures based on unlawful racial discrimination. Appellant demanded a jury trial as provided by §1981.

On motion of the Defendant, Count II of the complaint which relied on 42 U.S.C. §1981 was dismissed based on this Court's

decision in Patterson v. McLean Credit Union, 491 U.S. 164, 109 S.Ct. 2363 (1989) and the demand for a jury trial was stricken. (Appendix pages a-28, a-48, a-49).

Just prior to trial, the court on its own motion empaneled an advisory jury which heard the evidence adduced and reached the unanimous conclusion that the termination of Petitioner's employment was based on his race. (Appendix page a-52). Subsequently, the Parties submitted proposed findings of fact. Without offering any explanation, the Trial Judge ignored the advisory jury's determination and instead adopted the findings proposed by the Defendant. (See Appendix at page a-53).

Petitioner appealed to the U.S. Court of Appeals for the Third Circuit, which affirmed the district court's grant of

summary dismissal as to the §1981 claim, refused to apply heightened scrutiny to the district court's findings on the Title VII claim, and affirmed the judgment of the district court, even though it agreed that at least one of the findings of fact was clearly erroneous.

Petitioner requests writ of certiorari and requests that this Court review the determinations of the Court of Appeals.

The U.S. Court of Appeals for the Third Circuit had subject matter jurisdiction to hear and resolve this case by virtue of the federal questions raised under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e) and under 42 U.S.C. §1981.

Appellate jurisdiction rested with the Court of Appeals pursuant to 28 U.S.C. §1291 as an appeal from a final decision of a district court.

REASONS FOR GRANTING WRIT

I. BECAUSE IT INVOLVES AN ISSUE OF VITAL PUBLIC IMPORTANCE, THIS COURT SHOULD CORRECT THE MISINTERPRETATION OF ITS DECISION IN PATTERSON V. MCLEAN CREDIT UNION AND RULE THAT 42 U.S.C. §1981 AFFORDS A REMEDY IN CASES OF WRONGFUL TERMINATION BASED UPON RACE.

On its face Title 42 U.S.C. §1981 of the Civil Rights Act affords all persons within the jurisdiction of the United States "the same right in every State and Territory to make and enforce contracts."

This Court in the recent case of Patterson v. McLean Credit Union, 491 U.S. 164, 109 S.Ct. 2363 (1989) held that "Section 1981 cannot be construed as a general proscription of racial discrimination in all aspects of contract relations, for it expressly prohibits discrimination only in the making and enforcement of contracts." 491 U.S. at 176. Applying this principal the Court held that the petitioner's (Patterson)

claim of racial harassment was not actionable under §1981. The Court concluded that interpreting 42 U.S.C. §1981 to cover post-employment harassment which was unrelated to an employee's right to enforce her contract was not consistent with the statute's limitation to the making and enforcement of contracts.

The Supreme Court in Patterson v. McLean, did not address the issue whether §1981 would foreclose an action based on a racially motivated discharge. However, most of the federal courts have now extrapolated this Court's rationale in Patterson to conclude that racially motivated discharge is post-contract formation action which is no longer actionable under §1981. These holdings are not consistent with this Court's own application of §1981 to cases involving

racially motivated discharge and are contrary to the logic of Patterson v. McLean.

In the case of Johnson v. Railway Express Agency, this Court explicitly held that §1981 "affords a federal remedy against discrimination in private employment on the basis of race." Johnson v. Railway Express Agency, 421 U.S. 454, 459-460 (1975). In Johnson the discriminatory actions complained of were failure to promote and wrongful discharge. Although the Court found that the claim was barred based on a statute of limitation problem, it is clear that the Court included wrongful discharge within the gamut of actions protected by §1981.

Following Johnson, this Court, as well as the federal district courts, routinely applied §1981 to cases of wrongful termination. For example, in the case of

McDonald v. Santa Fe Trail Transportation Company, 427 U.S. 273, 96 S.Ct. 2574 (1976) this Court held that §1981 extended protection from racial discrimination in private employment to white persons. Again, the employment discrimination complained of in McDonald was a racially motivated discharge. (For federal courts' application of §1981 to wrongful discharge cases before and after Johnson, see e.g., Sanders v. Dobbs House, Inc., 431 F.2d 1097 (5th Cir. 1970). Long v. Ford Motor Co., 496 F.2d 500 (6th Cir. 1974); Brady v. Bristol-Meyers, Inc., 459 F.2d 621 (8th Cir. 1972), reversing and remanding 332 F.Supp. 995 (E.D. Mo. 1971), Williams v. DeKalb County, 577 F.2d 248 (1978) (rehrg. granted on other grounds 582 F.2d 2), and Flowers v. Crouch-Walker Corp., 552 F.2d 1277 (7th Cir. 1977)).

Even applying this Court's language in Patterson to the effect that only actions involving the making and enforcing of contracts are covered by §1981, the Petitioner's claims remain viable. When, as in the case at bar, an employer and employee have an at-will employment relationship, in effect the employer and employee are making an employment contract every day. The discriminatory termination of the at-will employment relationship prohibits the employee from making and enforcing his daily employment contract.

A number of Federal district courts considered the language of Patterson v. McLean, and held that discharge cases remained within the scope of 1981. Padilla v. United Airlines, 716 F.Supp. 485 (Col. 1989); Asare v. Syms, No. 87-CV-0459 (EDNY, 9/20/89); and Booth v.

Terminix International, 722 F.Supp. 675 (Kans. 1989). In Padilla, the court held:

> termination is part of the making of a contract. A person who is terminated because of his race, like one who was denied an employment contract because of his race, is without a job. Termination affects the existence of the contract, not merely the terms of its performance. Thus, discriminatory termination directly affects the right to make a contract contrary to Section 1981.

716 F.Supp. at 490. Put another way, the Defendant "impaired his ability to make an employment contract by terminating him and by preventing him from obtaining future employment with [his employer]." Id.

The court's approach in Booth v. Terminix was from the perspective of enforcement of contract. The Court held that a job termination could not be deemed to be within the scope of Patterson v. McLean, because termination is part of contract enforcement and thus is

actionable under Section 1981. Booth, supra.

As reasoned by this Court in Patterson, Title VII may be a more appropriate remedy where there is an on-going relationship to salvage. However, once the employer has terminated that relationship, there is no on-going relationship to salvage.

Section 1981 affords no meaningful remedy unless it is interpreted as applying to cases of racially motivated discharge. If §1981 does not apply to discharges, employers who could not discriminate in hiring could hire a minority candidate and then discriminatorily terminate that person without liability under §1981.

Section 1981 provides important remedies that are not available under Title VII. In particular under §1981 the individual alleging discrimination has the

right to a jury trial. The importance of that right is underscored by the case at bar. Mr. Hayes' did in fact request a jury. That request was stricken but the court on its own initiative impaneled an advisory jury which unanimously found for the Petitioner. A Section 1981 jury verdict would have been binding on the court. In addition, compensatory and punitive damages may be awarded under §1981, but are not provided for by Title VII of the Civil Rights Act of 1964. Harris v. Richards Manufacturing Co., 675 F.2d 811 (6th Cir. 1982), Easley v. Anheuser-Busch, Inc., 758 F.2d 251 (8th Cir. 1985).

Termination is the capital punishment of employment. It is anomalous that an employee who is discriminatorily dismissed should be denied the full range of remedies available to the victims of

discrimination. It is illogical that an employee who is discriminatorily denied a position should be entitled to the greater protections afforded by §1981 than a person who is discriminatorily discharged from a position he held for nineteen (19) years.

Both the employee who is denied initial employment and the employee who is denied continued employment are in the same position. Each has been denied a livelihood and any benefits concomitant with the denied position. The Court should grant certiorari, rectify the widespread misinterpretation of its decision in Patterson v. McLean Credit Union, and hold that 42 U.S.C. §1981 protects victims of racially motivated discharge.

II. THIS COURT SHOULD AMPLIFY ITS DECISION IN ANDERSON V. CITY OF BESSEMER CITY AND PROVIDE FOR A HEIGHTENED STANDARD OF REVIEW WHEN A DISTRICT COURT ADOPTS VERBATIM THE FINDINGS OF FACT PREPARED BY A PARTY

WHEN THERE IS REASON TO DOUBT THAT THOSE FINDINGS REPRESENT THE JUDGE'S OWN CONSIDERED CONCLUSIONS.

In the case at bar, the District Court sua sponte impaneled an advisory jury. The trial judge submitted the following specific interrogatory to the advisory jury at the conclusion of the trial "Has plaintiff shown by a fair preponderance of the evidence that the termination of his employment by defendant was based upon his race? Yes _____ No _____." (Appendix page a-52) The advisory jury unanimously found in favor of the Plaintiff on the liability issue.

The parties subsequently submitted proposed findings of fact and conclusions of law.[2] The trial court adopted virtually

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[2] While not all of the Defendant's proposed finding were adopted by the Court, all of the Court's findings were taken from the Defendant's proposed findings, in the same ordering and the same wording. Attached as Exhibit A is a table relating the Court's findings to the

verbatim the findings of fact submitted by the Defendant and ruled against the Plaintiff. It is undisputed that a critical finding of fact, finding of fact 13, which was adopted verbatim by the court was clearly erroneous.[3] (Appendix page a-23). Nor, did the court indicate why it ignored the verdict of the advisory jury or explain why it resolved virtually all of the credibility determinations and conflicts of evidence in favor of Defendant.

In Anderson v. City of Bessemer City, 470 U.S. 564, 105 S.Ct. 1504 (1985), the Court reiterated its criticism of the practice of the verbatim adoption of findings of fact prepared by prevailing

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corresponding Defendant's proposed findings.

[3] That finding of fact number 13 is as follows: "Mr. Hayes never disputed Mr. Pierce's testimony."

parties. 470 U.S. 564. However, in Anderson the trial court itself

> provided the framework for the proposed findings when it issued its preliminary memorandum, which set forth its essential findings and directed petitioner's counsel to submit a more detailed set of findings consistent with them . . . Nor did the District Court simply adopt petitioner's proposed findings: the findings that were ultimately issued . . . vary considerably in organization and content from those submitted by Petitioner's counsel. Under these circumstances, we see no reason to doubt that the findings issued by the District Court represent the judge's own considered conclusions. There is no reason to subject those findings to a more stringent appellate review than is called for by the applicable rules.

470 U.S. at 572- 573 (Emphasis added)

The Court in Anderson referred to its earlier decisions in United States v. El Paso Natural Gas, 376 U.S. 651 (1964) and United States v. Marine Bancorporation, 418 U.S. 602 (1974). In both El Paso Natural Gas and Marine Bancorporation, the trial judge had, at the conclusion of the

trial, made a bench decision and then requested the parties to submit proposed findings of fact and conclusions of law. Thus, in Anderson and in the El Paso Natural Gas and Marine Bancorporation cases, it is clear that the trial judge had made its own conclusion at the end of the trial and publically articulated that conclusion, prior to adopting the findings of fact. It was under such circumstances that this court held that such verbatim findings would be reversed only if clearly erroneous.

However, a key part of Anderson was the conclusion that it saw "no reason to doubt the findings issued by the District Court represent the judge's own considered conclusions. There is no reason to subject those findings to a more stringent appellate review than is called for by the applicable rules." 470 U.S. at 573.

The Third Circuit Court of Appeals below construed Anderson as requiring the application of the clearly erroneous standard.[4] The United States Court of Appeals for the District of Columbia Circuit has referred to the above quoted language from Anderson "enigmatic." Gerber v. Ironworkers Reinforced Rodmen, Local 201, 843 F.2d 1395 (D.C. Circuit 1988) at page 1407, n.3. The Ninth Circuit Court of Appeals has found that this issue of heightened scrutiny "is not clear" in light of language in Anderson. Vision Sports v. Melville Corp., 888 F.2d 609, 614, n.6. (1989). The Seventh Circuit Court of Appeals has interpreted this

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[4] Of course, the Petitioner submitted, and submits, that the district court's decision should have been reversed because finding of fact 13, which was undisputably clearly erroneous, and was so found by the Third Circuit Court of Appeals to be clearly erroneous, should have been a basis for reversal in and of itself. (Appendix page a-9).

Court's decision in Anderson as still permitting reversal when "adoption of findings demonstrates such an abdication of the judicial function that we must return the case to obtain the judge's own views on the matter." Scandia Down Corp. v. Euroquilt, 772 F.2d 1423, 1429 (1985). Thus, to be sure there is some confusion among the circuits as to how to interpret this Court's language in Anderson v. City of Bessemer City when there is reason to doubt the trial court has gone through the process which it should go through to judge a case.

In the instant case, the trial judge, on his own, impaneled an advisory jury. Impaneling an advisory jury was certainly within the trial court's discretion. An advisory jury is appropriately impaneled in cases, such as this one, in which there is a substantial disparity of factual

allegations, with a number of credibility determinations and factual conflicts to be resolved. Gared v. Beall, 92 U.S. 684, 693 (1875). While an advisory jury verdict may not be binding, "it is intended to inform the conscience of the chancellor." Watt v. Starke, 101 U.S. 247, 252 (1879).

In the instant case, the jury advised the trial judge as to its unanimous conclusion that the termination of Mr. Hayes was racially motivated. Had the court not felt at the end of the trial that the advice of the advisory jury was still needed, it could have simply wound up the proceedings at that point, and not propounded its interrogatories to the jury. After having solicited the advice of the advisory jury, after having its conscience informed, the trial court did not address whatsoever why it felt the

advisory's jury verdict to be unsatisfactory or deficient. Instead, creating the appearance of manifest injustice, the trial court adopted virtually verbatim, the proposed findings of fact of the Defendant as its findings of fact.

As the Second Circuit Court of Appeals has held, actually making the findings of fact is a far more important purpose than just providing guidance to the upper courts.

> While it does serve that end, it has a far more important purpose -- that of invoking care on the part of the trial judge in ascertaining the facts. Or, as every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty: Often a strong impression that, on the basis of the evidence, the facts are thus - and - so, gives way when it comes to expressing that impression on paper. The trial court is the most important agency of the judicial branch of the government precisely because on it rests the responsibility of ascertaining the

> facts. When a federal trial judge sits without a jury that responsibility is his. And, it is not a light responsibility since, unless his findings are "clearly erroneous" no upper court may disturb them. To ascertain the facts is not a mechanical act. It is a difficult art, not a science. It involves skill and judgment as fact-finding is a human undertaking, it can, of course, never be perfect and infallible. For that very reason every effort should be made to render it as adequate as is humanly can be.

United States v. Forness, 125 F.2d 928, at 942-943 (1942). (Emphasis added)

In adopting verbatim the Defendant's proposed findings of fact, the trial court adopted finding of fact 13 which was clearly erroneous.[5] The trial court's

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[5] The trial court's finding of fact number 13, duplicating the Defendant's proposed finding of fact number 19, was that "Mr. Hayes never disputed Mr. Pierce's testimony. [referring back to finding of fact 12 stating that "Mr. Pierce testified that Mr. Hayes admitted to him that he had been untruthful to Mr. McBrayer." It is undisputed that this was patently and clearly erroneous because at the trial Mr. Hayes specifically disputed Mr. Pierce's testimony. (N.T. p. 115,

verbatim duplication of such a clearly erroneous fact concerning a major factual contention in the case is substantial reason to doubt that the findings issued by the trial court represented its own "considered conclusions." The odds that a trial court, independently using its own judgment, would arrive at exactly the same clearly erroneous finding of fact submitted by the Defendant are infinitesimal.

When one attempts to prove plagiarism, it is the duplication of error that is most telling. An individual can claim to have duplicated an existing truth by virtue of an independent thought process. But duplicating, through an independent thought process an identical error, is contrary to human experience.

Appendix page a-68,69). And the Third Circuit Court agreed this was a clearly erroneous finding. (Appendix page a-9)

The substantial reason to doubt that the findings of fact adopted verbatim represent its own considered conclusion is exacerbated by the fact that the trial court ignored, without any explanation, the advisory jury's verdict. Thus, we have a situation which has the appearance, especially to the public, of a denial of justice. The trial court, sua sponte impaneled an advisory jury, asked the advisory jury for its verdict, inexplicably ignored the advisory jury's verdict, and instead adopted verbatim the findings of fact of the Defendant, including a clearly erroneous finding of a pivotal fact.[6]

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[6] This was a pivotal issue because the Defendant claimed it believed the Plaintiff lied about the reason he took a personal day off, and that the Plaintiff admitted it to Pierce. The Plaintiff denied lying about the reason he took a personal day off and denied he admitted to Pierce he lied. If Hayes did not dispute the admission to Pierce, as the Court

Thus, this case gives this Court an excellent opportunity to draw the line against a practice which it, and other appellate courts, consistently criticize. By clearly enunciating a heightened standard of review where a trial court adopts verbatim the findings of a party under circumstances in which there is reason to doubt the trial court made its own independent conclusions, this practice is bound to be curtailed. If this Court continues to ignore this practice, it is bound to get worse, and public confidence in the integrity of the judicial system is bound to be eroded thereby.

CONCLUSION

Until this Court's decision in Patterson v. McLean Credit Union, it was generally understood that §1981 provided

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found in adopting the Defendant's facts, then Hayes' position is cut out from under him.

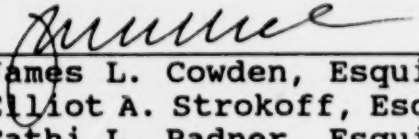
a legal remedy to the victims of a racially motivated job termination. This Court's decision in Patterson v. McLean Credit Union, which was concerned with on-the-job harassment, has been widely misinterpreted to preclude a racially motivated job termination. This Court should grant certiorari in order to expressly decide the issue and hold that the traditional §1981 remedy for victims of racially motivated job termination is still viable.

Furthermore, this Court should grant certiorari and hold, as was implicit in its holding in Anderson v. Bessemer City, that when there is reason to doubt the verbatim adopted findings issued by a district court do not represent the judge's own considered conclusions, such findings will be held to a more stringent, heightened appellate review. Unless and

until this Court establishes such a standard, the terrible practice of adopting verbatim a party's findings of fact, will continue.

Respectfully submitted,

STROKOFF & COWDEN, P.C.

By 

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ATTACHMENT A

Table relating Judge's findings to Defendant's proposed findings.

JUDGE'S FINDINGS	CORRESPONDING DEFENDANT'S PROPOSED FINDINGS
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Filed August 8, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-5984

TALMADGE W. HAYES

Appellant

COMMUNITY GENERAL
OSTEOPATHIC HOSPITAL and
BERT McBRAYER,

Appellees

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
(D.C. Civil Action No. 89-1600)

Argued May 7, 1991

BEFORE: MANSMANN and NYGAARD,
Circuit Judges, and RONEY, *Circuit Judge**

(Opinion Filed August 8, 1991)

---

* Honorable Paul H. Roney, United States Senior Circuit Judge for the Eleventh Circuit Court of Appeals, sitting by designation.

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OPINION OF THE COURT

NYGAARD, Circuit Judge

The primary issue in this appeal is whether 42 U.S.C. § 1981 provides a cause of action for a racially motivated discharge. The district court held that racially motivated employment termination claims are not actionable under 42 U.S.C. § 1981, and that Hayes was fired for non-discriminatory reasons. We will affirm.

I.

FACTS AND PROCEDURE

Appellant Talmadge W. Hayes was employed by the Community General Osteopathic Hospital in Harrisburg, Pennsylvania for more than nineteen years before being discharged on May 16, 1988. Hayes worked as a Purchasing Manager and was the Hospital's only black management level employee.

In November of 1986, Hayes' supervisor, Bert McBrayer, reprimanded Hayes for smelling of alcohol. A few weeks later McBrayer gave Hayes written notice that again "the odor of alcohol was present about [his] person." The notice warned Hayes that he could be suspended or terminated if he smelled of alcohol again. In January of 1988, McBrayer issued another warning marked "final notice" to Hayes regarding his "problem with alcohol."

On the morning of April 25, 1988, Hayes called his secretary to say he was experiencing car trouble near Philadelphia, would not be able to make it to work, and, therefore, would take the day off as a personal day. Hayes' secretary had Hayes speak to McBrayer. Hayes told McBrayer that his car had been towed and he was awaiting repairs, and agreed to try to make it to work later in the day. Nevertheless, Hayes remained absent.

When Hayes arrived at work the next day, McBrayer immediately questioned him about the car trouble. Hayes reiterated what he said the day before on the phone: his car had been towed and repaired near Philadelphia. McBrayer demanded towing and repair receipts. Hayes then modified his original story, explaining instead that a relative had repaired his car. When Hayes refused to verify this new story, McBrayer gave Hayes one hour to submit his resignation, or else be fired. Hayes resigned.

Later, the Hospital's President allowed Hayes to rescind his resignation in order to grieve his termination through the Hospital's internal grievance procedure. Hayes did not succeed in his grievance hearing, and the Hospital's President converted Hayes' resignation into a formal discharge. At trial, the Hospital President testified

that he formally discharged Hayes because he had lied to McBrayer about why he took the day off. A Hospital Vice President testified that Hayes admitted that he had lied to his supervisor about why he took the day off. The Hospital admits that Hayes' job performance was "reasonable" and "acceptable" until his termination.

Hayes filed a complaint in the district court against McBrayer and the Hospital, alleging his termination was racially motivated in violation of both Title VII, 42 U.S.C. § 2000e *et seq.* (Count I), and 42 U.S.C. § 1981 (Count II). In Count II, Hayes also alleged that he was denied access to the same full and fair internal grievance procedure the Hospital affords white employees who challenge discharge.

Before discovery, the district court granted the Hospital's Fed. R. Civ. P. 12(c), motion to dismiss that portion of Count II of Hayes' complaint which alleged his right to *enter* into a contract had been violated by his racially motivated discharge. The district court held that *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), barred such a claim under 42 U.S.C. § 1981.

Nevertheless, the district court allowed Hayes to proceed on his § 1981 allegation that his right to *enforce* an employment contract had been infringed by a discriminatory denial of access to the Hospital's internal grievance procedure. Following discovery, however, the district court granted partial summary judgment to the defendants on this remaining § 1981 claim as well.[1]

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1. Hayes does not appeal the district court's partial summary judgment against him on his § 1981 allegation that he was denied access to the Hospital's internal grievance procedure.

After trial, the jury returned an advisory verdict in favor of Hayes. The district court entered judgment against Hayes on his Title VII claims, concluding, contrary to the advisory verdict, that Hayes was discharged for a nondiscriminatory reason: lying to his supervisor about why he took a personal day.

II.

RACIALLY MOTIVATED DISCHARGE UNDER 42 U.S.C. § 1981

Hayes argues that the district court erred by dismissing his claim that his discharge was racially motivated, violating 42 U.S.C. § 1981. Our standard of review of a dismissal under Fed. R. Civ. P. 12(c) is plenary. *Jablonski v. Pan American World Airways, Inc.*, 863 F.2d 289, 290 (3d Cir. 1988). We apply the same test used by the district court in the first instance. *Society Hill Civic Association v. Harris*, 632 F.2d 1045, 1054 (3d Cir. 1980). The district court may not grant a motion to dismiss under Rule 12(c) "unless the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law,...view[ing] the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to the nonmoving party." *Id.* (*quoting* 5 C. Wright & A. Miller, *Federal Practice and Procedure*, § 1386, at 690 (1969)).

In *Patterson*, the Supreme Court held that employee claims of racial harassment on the job are not actionable under 42 U.S.C. § 1981.[2] The

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2. Section 1981 provides, in relevant part, that:

> [a]ll persons within the jurisdiction of the United States shall have the same right in every State...to

Court held § 1981 applies only to racial discrimination in the making or enforcement of private contracts and "cannot be construed as a general proscription of racial discrimination in all aspects of contract relations..." 491 U.S. at 76. Section 1981's anti-discrimination protections extend only to conduct involved in contractual formation, not to problems arising after a contract has been entered into, such as discriminatory breach of an employment contract or discriminatory working conditions. *Id.* at 176-77. The Court held that racial harassment of an employee occurring after formation of an employment contract was actionable as an unlawful employment practice under Title VII of the Civil Rights Act of 1964, but not under § 1981. *Id.* at 179-180.[3]

Patterson did not hold specifically that claims of racially motivated discharge were barred under § 1981. Nevertheless, we find *Patterson's* direction clear, and hold that such discharge is not actionable under § 1981.[4] Like on-the-job

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> make and enforce contracts...as is enjoyed by white citizens...

42 U.S.C. § 1981.

3. The *Patterson* Court recognized that some overlap between actionable § 1981 and Title VII claims was inevitable, but emphasized that its holding was informed in part by a reluctance to read the earlier statute, § 1981, broadly so as to result in a circumvention of a detailed scheme enacted in the later statute, Title VII. 491 U.S. at 181.

4. While we have not been called upon to so interpret *Patterson*, we have previously followed the decision by holding that racial harassment on the part of an employer was not actionable under § 1981. *See Matthews v. Freedman*, 882 F.2d 83, 85 (3d Cir. 1989).

harassment, job termination is clearly "postformation conduct" implicating performance of an existing employment contract, but not formation of such a contract. *Patterson*, 491 U.S. at 179. Accordingly, we hold that racially motivated discharge is actionable under Title VII, but not under § 1981. Consequently, we will affirm the district court's order granting defendants' Rule 12(c) motion to dismiss Hayes' § 1981 claim that he was fired because of his race.[5]

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5. In this respect, we join other courts which already have held that racially motivated discharge is not actionable under § 1981. *See Gersman v. Group Health Ass'n, Inc.* 931 F.2d 1565, 1571 (D.C. Cir. 1991); *Trujillo v. Grand Junction Regional Center*, 928 F.2d 973, 976 (10th Cir. 1991); *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1520 (11th Cir. 1991); *Williams v. First Union Nat'l Bank*, 920 F.2d 232, 233-34 (4th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2259 (1991); *Prather v. Dayton Power and Light Co.*, 918 F.2d 1255, 1256-58 (6th Cir. 1990), *cert. denied*, ___ U.S. ___, 1991 U.S. LEXIS 3876 (1991); *Patterson v. Intercoast Management of Hartford, Inc*, 918 F.2d 12, 13-14 (2d Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1686 (1991); *Carter v. South Central Bell*, 912 F.2d 832, 839 (5th Cir. 1990), *cert. denied*, ___ *U.S.* ___, *1991 U.S. LEXIS 3834 (1991)*; *McKnight v. General Motors Corp.*, 908 F.2d 104, 108-110 (7th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1306 (1991); *Courtney v. Canyon Television & Appliance Rental, Inc.*, 899 F.2d 845, 849 (9th Cir. 1990).

. Although a panel of the Court of Appeals for the Eighth Circuit held that claims of discriminatory employment discharge remain actionable under § 1981 in the aftermath of the *Patterson* decision, *see Hicks v. Brown Group Inc.*, 902 F.2d 630 (8th Cir. 1990), *vacated and remanded*, ___ U.S. ___, 111 S.Ct. 1299 (1991), the court effectively overruled the panel's decision in an *en banc* rehearing of another case, *Taggart v. Jefferson County Child Support Enforcement Unit*,

III.

TITLE VII CLAIMS

Hayes alleges that many of the district court's findings of fact on his Title VII claims were clearly erroneous. He also contends that we should subject the district court's findings of fact to "heightened scrutiny." We conclude that heightened scrutiny is not necessary, that only one of the district court's findings was clearly erroneous, and that it does not rise to the level of reversible error.

A.

Citing to *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564 (1985), Hayes argues heightened scrutiny of the district court's findings of fact is required in this case because the district court adopted, nearly verbatim, many of defendants' proposed findings. We reject this theory.

Anderson held that "even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed *only if clearly erroneous*." 470 U.S. at 572 (emphasis added). "A district court's verbatim adoption of findings proposed by one party is not, of itself, error...[O]ur review is only to determine whether the findings are supported by the evidence of

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915 F.2d 396 (8th Cir. 1990), *aff'd on rehearing*, ___ F.2d ___, 1991 WL 94352 (1991). Other than the initial decision of a panel of the Court of Appeals for the Eighth Circuit, we are aware of no Court of Appeals which has held that discriminatory discharge claims remain viable under § 1981 in the wake of *Patterson*.

record. If they are, then their source of origin is of no moment to the resolution of this appeal." *Hassine v. Jeffes*, 846 F.2d 169, 173 n.1 (3d Cir. 1988). Thus, the district court's adoption of defendants' proposed findings does not warrant the heightened scrutiny Hayes seeks.

Alternatively, Hayes contends heightened scrutiny is required because of the district court's failure to follow, or at least to explain its divergence from, the advisory jury verdict. We reject this proposition too. A trial court has full discretion to accept or reject the findings of an advisory jury. *Marvel v. United States*, 719 F.2d 1507, 1515 n.12 (10th Cir. 1983). If it rejects such findings, on appeal its findings of fact are to be reviewed as if there was no advisory jury recommendation. *Id.* (citing 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2335, at 127 (1971)).

Accordingly, no "heightened scrutiny" of the District Court's findings of fact are required in this case. We therefore limit our review of the District Court's findings to whether they were clearly erroneous. *Robinson v. Lehman*, 771 F.2d 772, 778 n. 14 (3d Cir. 1985); Fed. R. Civ. P. 52(a).

B.

We agree with Hayes that the district court erred by finding that Hayes never disputed the trial testimony of the Hospital's Vice President of Human Resources. This Vice President testified that Hayes admitted lying to McBrayer about why he took the day off. The record establishes that Hayes did expressly dispute this testimony. Nevertheless, the district court's erroneous finding is harmless error which does not require us to reverse either the court's ultimate conclusion that

Hayes was dismissed for a non-discriminatory reason, namely, because he lied to his superior; or its determination that there was insufficient evidence in the record to support a finding that Hayes was terminated because of his race.

In *Anderson*, 470 U.S. at 573-74, the Supreme Court articulated the scope of appellate review of a district court's findings in a Title VII discrimination case. "If the district court's account of the evidence is plausible in light of the record reviewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* at 573-74. Further, we must give "due regard...to the opportunity of the trial court to judge the credibility of the witnesses." Fed. R. Civ. P. 52(a).

Here, the district court made a distinct, specific finding that the Hospital's Vice President of Human Resources "testified truthfully" that Hayes admitted lying to his supervisor. Given the deference we must here accord the district court's credibility determinations, we conclude its account of the evidence was "plausible" when the record is reviewed in its entirety, notwithstanding the one erroneous finding. *Anderson*, 470 U.S. at 574. McBrayer's testimony and that of the Vice President provide sufficient evidence to support the district court's ultimate finding that Hayes was discharged for lying to his superior, not for reasons related to his race. Nothing in the record indicates the district court discredited any testimony establishing that Hayes lied or that the court's ultimate result rested substantially on its

mistaken finding that Hayes did not dispute the Vice President's testimony.[6]

Based upon our review of the record, we cannot say the district court erred by concluding that there was "insufficient evidence on which to base a factual finding that defendant discriminated against plaintiff because of his race," and that Hayes' "employment ended because he was untruthful to his superior...". District court Opinion at 4. Substantial evidence in the record supports these conclusions. *See Robinson*, 771 F.2d at 778 n. 14 (district court's legal conclusions will not be reversed on appeal if supported by substantial evidence in the record such that the court's determinations are neither arbitrary nor capricious).[7]

IV.

CONCLUSION

We will affirm the district court's order dismissing Hayes' § 1981 claim and the judgment for defendants on Hayes' Title VII claims.

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6. The district court did not determine specifically that Hayes established a *prima facie* case of discrimination. Therefore, it is not clear whether the court concluded that Hayes made out a *prima facie* case but then failed to successfully rebut the hospital's legitimate, nondiscriminatory reason (lying) proffered for his termination, or alternatively, that Hayes failed to establish his *prima facie* case as a threshold matter. We will assume for purposes of this appeal that Hayes established a *prima facie* case.

7. Without enumerating them here, we have also carefully reviewed Hayes' several other allegations of error and find no error requiring reversal.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing, Phila., Pa. 215-568-4264)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

TALMADGE W. HAYES, Plaintiff	:	
vs.	:	CIVIL ACTION NO. 1:CV-89-1600
COMMUNITY GENERAL OSTEOPATHIC HOSPITAL: Defendant	:	

DISCUSSION

This was a Title VII claim (42 U.S.C. §2000e, et seq.) tried without a jury, in which plaintiff contends that his employer terminated his position based upon his race. After a thorough review of the evidence and the arguments of counsel the court concludes plaintiff has failed to prove his case by a fair preponderance of evidence.

[1] As disclosed in the findings of fact that follow, there was no evidence to support plaintiff's claim of racial discrimination except a single statement

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[1] An advisory jury reached the opposite conclusion.

allegedly made by plaintiff's superior. The weight of the evidence presented at trial actually negated the existence of racial discrimination and supported the reasons given by plaintiff's employer for terminating his employment.

The evidence disclosed that during his nineteen (19) years of employment with defendant plaintiff was treated fairly [2] and impartially, despite an ongoing problem related to his use of alcohol. Plaintiff had been warned a number of times about reporting for work with odor of alcohol about him, and was told several months prior to his termination that he had received his final warning. On Monday morning April 25, 1988, plaintiff called his office and indicated he would not be able to report to work that day because he had experienced car trouble in the Philadelphia area. He spoke with his supervisor and indicated that he would try

to report during the afternoon but did not. On Tuesday morning (April 26, 1988), when he reported for work, he was questioned by his superior, who no doubt suspected plaintiff's absence the day before was related to his prior problem. Plaintiff reported that his car had become disabled in the Philadelphia area and had to be towed to a garage by AAA, where repairs were made. When he was asked to confirm his explanation by producing towing and/or repair receipts, he acknowledged this account was not true. He then indicated that his vehicle had been towed and repaired by a relative who operated an auto body shop. Plaintiff refused to comply with his superior's request for the relative's phone number, so that his second account could be confirmed. Under all of the circumstances, there was sufficient evidence for plaintiff's superior to conclude, as he

did, that plaintiff was being deliberately untruthful, and that his absence from work the previous day was related to his consumption of alcohol. He was told that his employment would be ended [3] immediately because he had been untruthful and he was given an hour to submit a letter of resignation. If one was not forthcoming he was told he would be discharged.[2]

The only possible evidence to support the claim that race was a factor in his firing, was plaintiff's account of a remark made by his superior the morning of April 26, to the effect that, "you people" have a Monday problem. The superior denied that any such remark was made. Plaintiff contends that the phrase "you people"

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[2] Plaintiff did submit a resignation on April 26, 1988. Later, after conferring with defendant's president he was allowed to withdraw his letter and he was formally discharged by defendant's president on May 16, 1988.

referred to his race, but in the context of the evidence presented at trial, if the remark was made, it could be construed as a reference to people who overindulge and experience work related difficulties. Assuming it was a racial remark, there is no support for the contention that there was a relationship to defendant's decision to terminate his employment. First, the plaintiff did not dispute that when drinking he would over-indulge, that this habit had caused him to be warned by his employer, and that he had been told several months before his discharge that he had been warned for the last time. During his long term employment plaintiff had encountered no prior suggestion of racial discrimination and, in fact, his employer had offered assistance and demonstrated tolerance concerning plaintiff's personal problems. With this history we consider it highly improbable

that [4] plaintiff would be dismissed based upon his race. The evidence strongly supports the finding that plaintiff's drinking the previous night caused his absence on April 25, 1988, and he was discharged when he lied to avoid what he had been told would occur. Plaintiff was untruthful with his superior and such conduct is grounds for dismissal of employment at the defendant hospital (a white female supervisor had been discharged immediately when it was discovered she had lied concerning the performance of her duties).

Under all the evidence the court is led to conclude that plaintiff's employment ended because he was untruthful to his superior concerning a material matter. There is simply insufficient evidence on which to base a factual finding that defendant discriminated against plaintiff because of his race.

Conclusion:

It must be emphasized that in assessing the evidence the court neither endorses or passes judgment on the wisdom or the fairness of the employment action taken by the employer. Our finding is limited to the single issue of whether plaintiff has shown his employer based its action in discharging him on his race. It is concluded he has not done so and that plaintiff's race was not a factor in his discharge. The evidence disclosed a legitimate, non-racial, basis for defendant's action, and plaintiff has failed to sustain the burden of proof that he bears [5] in this matter to show discrimination by a fair preponderance of the evidence.

FINDINGS OF FACT

1. On November 8, 1989, plaintiff instituted this action in which he claimed, inter alia, a violation of Title

VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq.

2. Plaintiff's claim is premised upon his employment discharge from Community General Osteopathic Hospital (CGOH), which he alleges was because of his race.

3. On Monday morning, April 25, 1988, Mr. Hayes called defendant and indicated he would take the day off, as a personal day.

4. Mr. Hayes spoke with Mr. Bert McBrayer, his superior. Based upon their conversation, Mr. McBrayer believed that Mr. Hayes had been drinking. In Mr. McBrayer's opinion, the effects of drinking are not an acceptable reason to take a personal day off from work.

5. Mr. Hayes admitted at trial that he had been out drinking Sunday evening, April 24, 1988.

6. In their conversation Mr. Hayes told McBrayer he would try to come to work

later on the afternoon of April 25, but he did not report for work until April 26. [6]

7. Before plaintiff returned to work Mr. McBrayer met with his superior, Jay Rathfon, and spoke with him about his concerns regarding Mr. Hayes' drinking. Rathfon agreed that if Mr. Hayes was absent from work because he had been drinking, Mr. McBrayer could discharge Mr. Hayes.

8. When Mr. Hayes appeared for work on Tuesday, April 26, 1988, Mr. McBrayer questioned Mr. Hayes as to the reasons for his absence the day before. Mr. Hayes first gave Mr. McBrayer one explanation, and when requested to verify it he admitted it was untrue and offered another version. Plaintiff refused to permit his employer to verify the second excuse.

9. Mr. McBrayer concluded that Mr. Hayes had lied to him concerning the

reasons for his absence. He advised Mr. Hayes that he could resign or be fired, and his decision should be made in approximately one hour.

10. In that hour, Mr. McBrayer reviewed these events and his decision with Mr. Rathfon and Mr. Pierce, defendant's then Vice President of Human Resources.

11. Mr. Pierce would have arrived at a different decision, but he agreed that the decision made by Mr. McBrayer and approved by Mr. Rathfon was a valid action.

12. During the same time period, Mr. Pierce was asked by Mr. Hayes if Mr. McBrayer could discharge him? Mr. Pierce stated that, if Mr. Hayes had lied to [7] Mr. McBrayer, he could be fired. Mr. Pierce then asked if Mr. Hayes had, in fact, lied to Mr. McBrayer. Mr. Pierce testified that Mr. Hayes admitted to him

that he had been untruthful to Mr. McBrayer.

13. Mr. Hayes never disputed Mr. Pierce's testimony.

14. Following this discussion, Mr. Hayes delivered his resignation to be effective 30 days from April 26, 1988.

15. During the week of April 25, 1988, George Strohl, Jr., President of the defendant, was out of town. During this period, Mr. Strohl spoke with Mr. Pierce about Mr. Hayes. Mr. Pierce informed Mr. Strohl that the decision was appropriate because Mr. Hayes had admitted to Mr. Pierce that he had lied to Mr. McBrayer.

16. By letter from Mr. Hayes to Mr. Strohl dated May 9, 1988, Mr. Hayes requested that the defendant rescind his resignation.

17. By letter to Mr. Hayes form Mr. Strohl dated May 16, 1988, defendant converted the resignation to a discharge

for improper conduct. In that letter, Mr. Strohl informed Mr. Hayes that the "conduct warranting your discharge involves your admitted falsification to your superior."

18. Mr. Strohl's decision to discharge Mr. Hayes was based upon only what Mr. Pierce had told Mr. Strohl about Mr. Hayes admission of lying to Mr. McBrayer.

19. Mr. Hayes failed to show that other similarly situated persons not in his protected category were treated more [8] favorably than he despite their commission of comparably serious misconduct.

20. The only evidence with respect to discipline imposed on a management employee who lied to a superior came from Mr. Rathfon. He testified that he fired a supervisor immediately upon discovering she had lied to him about the status and processing of a matter under her control.

21. Mr. Hayes testified that Mr. McBrayer made a statement on April 26, 1988, to the effect that, "You people have a pattern for Mondays." Mr. McBrayer denied ever having made such a statement.

22. If such statement was made, it was an isolated and unfortunate remark.

23. Prior to April 26, 1988, Mr. McBrayer believed Mr. Hayes had a problem with alcohol.

24. On November 25, 1986, within three days of becoming plaintiff's superior, Mr. McBrayer disciplined plaintiff for having the smell of alcohol on his person while at work on November 25, 1986.

25. On December 10, 1986, Mr. McBrayer again disciplined Mr. Hayes for having the smell of alcohol on his person.

26. In 1987, Mr. McBrayer noticed some improvement in this deficiency and stated, in Mr. Hayes' 1987 performance evaluation

that "personal problems have been discussed and have improved." [9]

27. However, on or about January 25, 1988, Mr. McBrayer issued Mr. Hayes a final notice concerning his alcohol problem, with a warning that if it occurred again Mr. Hayes would be dismissed.

28. Mr. Hayes asked Mr. McBrayer if he knew of any rehabilitation programs and Mr. McBrayer referred him to Mr. Pierce.

29. Mr. Pierce spoke with Mr. Hayes regarding insurance coverage for the treatment of alcohol, but Mr. Hayes did not follow up on any recommendations concerning rehabilitation.

30. Mr. Hayes did not show that race was a motivating factor in McBrayer's or Strohl's decision to discharge him.

31. Mr. Pierce testified truthfully concerning the conversation he had with Mr. Hayes on April 26, 1988, when Mr.

Hayes admitted to Mr. Pierce that he lied to Mr. McBrayer.

CONCLUSION AND JUDGMENT OF LAW

1. Plaintiff has failed to show that he was discharged from defendant's employment based upon race, and judgment is entered in favor of the defendant.

/S/

William W. Caldwell
United States District Judge

Date: October 26, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

TALMADGE W. HAYES, Plaintiff	:	
vs.	:	CIVIL ACTION NO. 1:CV-89-1600
COMMUNITY GENERAL OSTEOPATHIC HOSPITAL: and BERT MCBRAYER, Defendants	:	

M E M O R A N D U M

Pursuant to Fed R. Civ. P. 12(b)(6), defendants, Community General Osteopathic Hospital (CGOH) and Bert McBrayer, have filed a "motion for partial dismissal," seeking to dismiss count II of plaintiff's complaint.[1] Plaintiff's two count

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[1] The defendants' motion for a partial dismissal of count II is in effect a motion for judgment on the pleadings under Fed. R. Civ. P. 12(c) since defendants filed an answer along with the motion. A motion for judgment on the pleadings should be granted only if there is not an issue of material fact and if the pleadings show that the the moving party is entitled to judgment as a matter of law. The trial court is required "to view the facts presented in the pleadings and inferences to be drawn therefrom in the light most favorable to the non-moving party." See Society Hill Civic Ass'n. v. Harris, 632 F.2d 1045, 1058 (3d Cir. 1980)

complaint alleges he was discriminatorily discharged from employment with CGOH because of race. Count I is based upon Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., and count II on 42 U.S.C. § 1981. Defendants argue that in light [2] of the Supreme Court's decision in Patterson v. McLean Credit Union, ___ U.S. ___, 109 S.Ct. 2363, 105 L.Ed 132 (1989), plaintiff has no cause of action under section 1981 for his discriminatory discharge claim.

According to the complaint, plaintiff, Talmadge Hayes, a black male, was employed by defendant CGOH as its purchasing manager. He was the only black management employee, and had been employed by CGOH for over 19 years. Plaintiff alleges that he was discriminatorily discharged from

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(quoted treatise omitted). We believe this requires us to accept the allegations of the complaint where they are in conflict with the answer. See Jones v. Loque, 615 F.Supp. 442 (W.D. Pa. 1985).

implicate his [3] right to make or enforce contracts within the meaning of the statute. In Patterson, the Supreme Court clarified the scope of § 1981 in redressing racial discrimination. The section offers two protections. It protects: 1) the right to make contracts; and 2) the right to enforce contracts.[3] In discussing the right to make contracts, the Court stated that this right "does not extend, as a matter of logic or semantics, to conduct by the employer after the contract relation has been established." ___ U.S. at ____, 109 S.Ct. at 2372-73,

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[3] Section 1981 reads as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

105 L.Ed.2d at 150-51. Thus, postformation conduct such as breach of contract, or the imposition of discriminatory working conditions, does not implicate the right to make a contract and is therefore not within the scope of the statute's first protection. See id.

Based upon the foregoing analysis, although Patterson did not specifically address the issue of whether an alleged discriminatory discharge is actionable under § 1981, courts construing Patterson have embraced an interpretation of the section which excludes discharge from its protection for the [4] making of contracts. See, e.g, Hall v. County of Cook, 719 F.Supp. 721 (N.D. Ill. 1989); James v. Dropsie College, 1989 WL 143171 (E.D. Pa.); Owens v. Foot Locker, 1989 WL 138839 (E.D. Pa.); Eklof v. Bramalea Ltd., 1989 WL 129357 (E.D. Pa.); Leong v. Hilton Hotels Corp., 1989 WL 116880 (D. Haw.

1989); Copperidge v. Terminal Freight Handling Co., 1989 WL 112829 (W.D. Tenn. 1989). There are cases to the contrary. Plaintiff cites Padilla v. United Airlines, 716 F.Supp 485 (D. Colo. 1989) and Asare v. Syms, Inc., 1989 WL 113162 (E.D. N.Y.) in support of his contention that termination affects the making of a contract and is thus action under section 1981. We disagree with these cases. We think the better rule was stated by the court in Hall, supra, 719 F.Supp. at 723-24. We therefore reject plaintiff's contention that a racially motivated discharge is actionable under section 1981 as interfering with the right to make a contract.

Plaintiff argues that a discriminatory discharge creates "a much more dramatically new and distinct relation between the employee and the employer than does a promotion," and thus should be

deemed related to the employer's ability to make or enforce an employment contract. (plaintiff's memorandum in opposition to defendants' motion for partial dismissal at p. 8). This contention is based upon language in Patterson indicating that a failure to give a promotion may be actionable under section 1981. But the Supreme Court recognized this possibility only when "the nature of the change in position was such that it involved [5] the opportunity to enter into a new contact with the employer." __ U.S. at __, 109 S.Ct. at 2377, 105 L.Ed.2d at 156. Admittedly, subsequent language was more broad: "Only where the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer is such a claim actionable under § 1981." Id. at __, 109 S.Ct at 2377, 105 L.Ed.2d at 156. But it was clearly tied into the need for a new

contractual relationship. See Melhotra v. Cotter and Company, 885 F.2d 1305, 1311 (7th Cir. 1989) ("The Court's reference to contract and its citation to Hishon suggest that in deciding whether a promotion would create 'a new and distinct relation between the employee and the employer,' the focus of inquiry should be on whether the promotion would change the terms of the contractual relationship between the employee and the employer."). A discharge does not create a new and distinct contractual relationship. To the contrary, it destroys and terminates any prior relationship. Accordingly, a discharge claim is untenable under section 181. See also Jordan v. U.S. West Direct, 716 F.Supp. 1366 (D. Colo. 1989) (wrongful demotion not actionable under § 1981); Alexander v. New York Medical College, 721 F.Supp. 587 (S.D. N.Y. 1989) (demotion and

then discharge not actionable under section 1981).

Plaintiff also argues that the discharge comes within the other prong of section 1981 - the right to enforce contracts. In Patterson, the Supreme Court interpreted that second prong to [6] prohibit

"efforts to impede access to the courts or obstruct nonjudicial methods of adjudicating disputes about the force of binding obligations." ___ U.S. at __, 109 S.Ct. at 2372, 105 L.Ed.2d at 151. Plaintiff has cited one case, Booth v. Terminix International, Inc., 722 F.Supp. 675 (D. Kan. 1989), which has held that a discriminatory discharge is redressable under section 1981 as part of contract enforcement. See also Birdwhistle v. Kansas Power and Light Co., 723 F.Supp. 570 (D. Kan. 1989). We disagree with these cases. Discharge may be a breach of

contract but it does not interfere with or obstruct an employee's access to, or use of, judicial or nonjudicial methods of adjudicating disputes. See Alexander, supra. We must also reject plaintiff's reliance on Johnson v. Railway Express Agency, 421 U.S. 454, 95 S.Ct 1716, 44 L.Ed.2d 295 (1975) and McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976). Neither dealt directly with the issues raised in the instant case. Johnson was limited only to the issues of whether a timely filed charge of employment discrimination with the Equal Employment Opportunity Commission tolls the statute of limitations for a § 1981 claim under the same facts. McDonald held that whites could sue for discrimination under section 1981. Both cases, of course, pre-date Patterson and in the aftermath of that decision allegations of racial harassment

or discriminatory discharge alone are not actionable under § 1981. See Hall, supra, and other cases cited above. [7]

We must now decide whether the remaining averments of the complaint can rescue plaintiff's section 1981 claim. Unlike most of the prior cases, plaintiff is not relying solely upon his discharge to support his claim. He also avers that, because of racial prejudice, he did not receive an unbiased hearing provided for by the CGOH Personnel Policy and its Handbook. Significantly, plaintiff alleges in this regard that "[w]hite employees are disciplined" in accordance with the policy and handbook, that these provide for progressive discipline, and list only a few dischargeable offenses which are far more serious than the charge against plaintiff. (complaint, ¶ 13) (brackets added). Further, no white employee was ever discharged for plaintiff's alleged

offense. (Id., ¶ 14). the implication is that, if plaintiff had been white, these procedures would have preserved his employment, regardless of whether it was at will or not.

The defendants contend that these allegations do not avail plaintiff. They argue that the right to enforce contracts protected by section 1981 is limited to access to legal remedies such as the ability to initiate a lawsuit. Any defect in implementing the CGOH procedures did not impede plaintiff's access to the courts. Plaintiff has not even alleged that he was denied access to the grievance procedure. Further, employee handbooks are not contracts under Pennsylvania law and there is no requirement, in any event, that an employee exhaust the remedies [8] provided in the handbook before suing for breach of an employment contract under Pennsylvania law.

Defendants' position has some support in the Patterson opinion and the case law. See Matthews v. Northern Telecom, Inc., 1989 WL 131343 at pps. 3-4. (S.D. N.Y.) (section 1981's protection of the right to enforce contract is limited to private action causing a legal obstruction to plaintiff's case, noting the court's limitation in Patterson to the removal of legal disabilities to sue, be a party, testify or enforce a contract); Carter v. O'Hare Hotel Investors, 1989 WL 153338 at p. 6 (N.D. Ill.) (section 1981 merely removes legal disabilities to the enforcement of contracts). Other language in Patterson, however, would seem to support plaintiff. The language appears to us to be somewhat contradictory. See Fowler v. McCrory Corp., 727 F.Supp. 2287, ___ n. 2 (D. Md. 1989). We quote at length from the Court's discussion of the scope

of the protection offered by section 1981 to enforce contracts:

> The second of these guarantees, "the same right . . . to . . . enforce contracts . . . as is enjoyed by white citizens," embraces protection of a legal process, and of a right of access to legal process, that will address and resolve contract-law claims without regard to race. In this respect, it prohibits discrimination that infects the legal process in ways that prevent one from enforcing contract rights, by reason of his or her race, ... It also covers wholly <u>private</u> efforts to impede access to the courts <u>or obstruct nonjudicial methods of adjudicating disputes about the force of binding obligations</u>, as well as discrimination by private entities, [9] such as labor unions, in enforcing the terms of a contract. Following this principle and consistent with our holding in Runyon that § 1981 applies to private conduct, we have held that certain private entities such as labor unions, which bear explicit responsibilities to process grievances, press claims, and represent members in disputes over the terms of binding obligations that run from the employer to the employee, are subject to liability under § 1981 for racial discrimination in the enforcement of labor contracts. See Goodman v. Lukens Steel Co. 482 US 656, 96 L Ed 2d 572, 107 S Ct 2617 (1987). The right to enforce contracts does not, however, extend beyond conduct by an

> employer which impairs an employee's ability to enforce through legal process his or her established contract rights. As Justice White put it with much force in Runyon, one cannot seriously "contend that the grant of the other rights enumerated in § 1981, [that is, other than the right to "make" contacts,] i.e., the rights 'to sue, be parties, give evidence,' and '<u>enforce</u> contracts' accomplishes anything other than the removal of <u>legal</u> disabilities to sue, be a party, testify or enforce a contract. Indeed, it is impossible to give such language any other meaning." 427 US at 195, n 5, 49 L Ed 2d 415, 96 S Ct 2586 (dissenting opinions) (emphasis in original).

___ U.S. at ___, 109 S.Ct. 2372, 105 L.Ed at 155 (emphasis added in part).

The Court, on the one hand, seems to be saying that section 1981 broadly reaches private conduct that obstructs nonjudicial methods of adjudicating disputes about contracts, but, on the other hand, that it reaches only conduct which impairs the ability to enforce a contract through legal process, and further only to conduct which imposes a legal disability to sue or enforce a contract. Later, in the opinion,

the Court also stated that section 1981 would not apply as long as a "plaintiff's access [10] to state court or any other dispute resolution process has not been impaired by either the State or a private action . . . ." Id. at ___, 109 S.Ct. at 2376, 105 L.Ed.2d at 154-55 (cited case omitted). Some courts have accordingly recognized only claims based upon conduct impeding access to the process at issue. See, e.g. Carter, supra, 1989 LD 153338 at p. 6 (allegations that defendants knowingly provided incomplete and false information to the Illinois Human Rights Commission not actionable under 1981 when plaintiff did not allege that defendants impaired her access to the commission or the court).

We believe that we should adopt the first interpretation of the Patterson opinion - that the protection offered by section 1981 of the right to enforce

contracts reaches private conduct that obstructs nonjudicial methods of adjudicating disputes about the force of binding obligations. This interpretation is in line with other language in the opinion, which although specifically referring to the first protection offered by section 1981 for the making of contracts, can be of guidance here. The Court stated that "a lower court should give a fair and natural reading of the statutory phrase 'the same right . . . to make . . . contracts . . . .'" ___ U.S. at ____, 109 S.Ct. at 2377, 105 L.Ed. 2d at 156. More generally, the Court stated that a lower court "should not strain in an undue manner the language of § 1981." Id. at ___, 109 S.Ct at 2377, 105 L.Ed.2d at 156. [11]

Based upon the foregoing, we conclude that defendants' motion must be denied as to defendant CGOH. Section 1981 protects

the right of all persons to enforce contracts in the same way that white citizens can. This section extends to the conduct of private actors. Plaintiff has alleged that he is a black man who formerly had a contractual employment relationship with the defendant CGOH. CGOH gives a white employee an impartial hearing to determine if the employee should be discharged. Plaintiff asserts that on the basis of race, he was terminated without being given this same process, which is provided for by the CGOH personnel policy and employee handbook.

We believe these allegations are actionable under section 1981's protection for the enforcement of contracts. The CGOH hearing is a nonjudicial method of adjudicating disputes and the Supreme Court has said in Patterson that private actors obstructing such a method on racial grounds can be held accountable under

section 1981. We think it is irrelevant in this action that employee handbooks describing procedures and hearings and progressive discipline may or may not impose contractual obligations on the employer. See, e.g., Morosetti v. Louisiana Land And Exploration Co., ___ Pa. ___, 564 A.2d 151 (1989) (dictum); Martin v. Capital Cities Media, Inc., 354 Pa. Super. 199, 511 A.2d 830 (1986). This is not a pendent state law claim for breach of contract. It is a section 1981 claim for racial bias interfering with the enforcement of plaintiff's employment [12] contract. Plaintiff alleges, and we must accept as true, that CGOH provides a method of enforcing employment contracts for its white employees that was not made available to plaintiff. That the lack of a fair hearing may not be actionable as a matter of state contract law does not require that a section 1981 claim be

dismissed as well. The court's opinion in Patterson did not require that the method of enforcement be a contractual right; only that the plaintiff is attempting to enforce a contract and that a method available to white employees was not available to him.

We view the defect in process on racial grounds as the crucial element here.[4] As noted, we are unsure from the complaint whether plaintiff was granted no hearing at all or the hearing he received was unfair. If it was only the latter situation, we think that plaintiff can prevail only if the process was defective.[5] In other words, we will not

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[4] Violation of the progressive discipline provision by itself, for example, would merely be a breach of contract which would not be actionable in light of Patterson.

[5] Plaintiff elaborated somewhat n this claim in his opposition brief at p. 5 when he asserted that he was denied the right to give evidence and confront and cross-examine his accuser. This still leaves us

permit plaintiff to relitigate the merits of his discharge by re-evaluating the evidence and other submissions. Plaintiff will only prevail if he [13] can show he was not afforded the process other employees received.[6]

As already stated, the 1981 claim will be processed only as to CGOH. Plaintiff alleges that McBrayer was involved only with the discharge and the motion must be granted as to him.

We will issue an appropriate order.

/S/

William W. Caldwell
United States District Judge

Date: February 21 1990

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with doubt as to the exact nature of the hearing plaintiff was given.

[6] Plaintiff cannot prevail, for instance, if he only shows he received process which would be defective in some other setting, such as in a lawsuit. He must show he did not receive the process afforded other employees.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

TALMADGE W. HAYES, Plaintiff	:	
vs.	:	CIVIL ACTION NO. 1:CV-89-1600
COMMUNITY GENERAL OSTEOPATHIC HOSPITAL: and BERT MCBRAYER, Defendants	:	

O R D E R

AND NOW, this 21st day of February, 1990, upon consideration of defendants' motion for partial dismissal, treated as a motion for judgment on the pleadings, it is ordered that:

1. The motion is denied as to defendant Community General Osteopathic Hospital, and granted as to defendant, Bert McBrayer.

2. Count II of the complaint is hereby dismissed as to Bert McBrayer only.

/S/

William W. Caldwell
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

TALMADGE W. HAYES, Plaintiff	:	
vs.	:	CIVIL ACTION NO. 1:CV-89-1600
COMMUNITY GENERAL OSTEOPATHIC HOSPITAL: Defendant	:	

O R D E R

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

Defendants have filed a motion for partial summary judgment on count II of plaintiff's complaint. That count asserts a 42 U.S.C. § 1981 claim for plaintiff's discharge from employment with the defendant Hospital. Defendants had previously filed a motion to dismiss the section 1981 claim which we granted in part. See 730 F. Supp. 1333 (M.D. Pa. 1990). In so doing, we stated the things plaintiff would have to prove to prevail on such a claim. Essentially, we held that plaintiff would have to show that the process provided by the Hospital's

grievance procedure was flawed by racial bias. It would not be sufficient to show racial bias in his particular case.

Defendants argue that discovery demonstrates a lack of evidence to support such a showing. In response, plaintiff points only to evidence tending to show that there was a bias in his [2] discharge and the manner in which it was accomplished. We therefore agree with defendants and will grant their motion.

Defendants have also filed a motion to strike the jury demand. Since there is no right to trial by jury in a Title VII action, the only remaining claim in this action, we will grant that motion as well.

Accordingly, this 26th day of September, 1990, upon consideration of the defendants' motion for partial summary judgment and to strike the jury demand, it is ordered that:

1. Defendants' motion for partial summary judgment is granted and

judgment is hereby entered in favor of defendants and against plaintiff on count II of the complaint.

2. The motion to strike the jury demand is granted, but the parties are advised that the court intends to use an advisory jury pursuant to Fed. R. Civ. P. 39(c).

/S/

William W. Caldwell
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

TALMADGE W. HAYES, Plaintiff	:	
vs.	:	CIVIL ACTION NO. 1:CV-89-1600
COMMUNITY GENERAL OSTEOPATHIC HOSPITAL: Defendant	:	

V E R D I C T

1. Has plaintiff shown by a fair preponderance of the evidence that the termination of his employment by defendant was based upon his race?

Yes __X__ No _____

(If your answer is no, go no further and return to the courtroom).

2. After his termination, did plaintiff take reasonable steps to seek employment or otherwise mitigate or reduce his loss of earnings?

Yes __5__ No __1__

_____
Foreman

Dated: October 2, 1990

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

TALMADGE W. HAYES, Plaintiff	:	
v.	:	NO. 1: CV-89-1600
	:	(JUDGE WILLIAM W. CALDWELL)
COMMUNITY GENERAL OSTEOPATHIC HOSPITAL: and BERT MCBRAYER, Defendants	:	

DEFENDANT'S PROPOSED FINDINGS OF FACT

Community General Osteopathic Hospital ("CGOH"), by its attorneys, hereby proposes that the following facts be found by the court premised on the pleadings and the evidence presented at the trial conducted on October 1-2, 1990:

I. BACKGROUND

1. On November 8, 1989, Mr. Hayes instituted this action in which he claimed, inter alia, a violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (Complaint ¶1)

2. Mr. Hayes' claim is premised upon his May 16, 1988 employment discharge from CGOH, which he alleges was because of his race in violation of Title VII. (Complaint ¶¶ 9 and 15)

3. Mr. Hayes has satisfied all procedural prerequisites for instituting a court action pursuant to Title VII. [2]

II. BURDEN IN A TITLE VII CASE

4. A plaintiff in a Title VII case bears the burden of proving that he was the victim of race discrimination by a preponderance of the evidence.

5. A plaintiff alleging a discriminatory firing must show that he was fired from a job for which he was qualified, while others who were similarly situated and not in his protected class, were not fired.

6. If plaintiff establishes a prima facie case of discrimination, the burden shifts to the defendant to articulate a

legitimate, nondiscriminatory reason for firing the plaintiff.

7. Plaintiff may satisfy his ultimate burden of persuasion by proving that the reasons articulated by defendant are pretextual or otherwise unworthy of belief.

III. **THE APRIL 26, 1988 RESIGNATION**

8. On Monday, April 25, 1988, Mr. Hayes called in to take a personal day off without prior notice. Before this date, Mr. Hayes had not taken a personal day without prior notice in over a year.

9. Mr. Hayes spoke with Mr. Bert McBrayer, his superior, who testified that Mr. Hayes' voice sounded slurred and incoherent. Based upon this conversation, Mr. McBrayer believed that Mr. Hayes had been drinking. Mr. McBrayer testified that, in his opinion, drinking or being drunk was not an acceptable reason to take a personal day off from work. [3]

10. Mr. Hayes admitted at trial that he had been out drinking Sunday evening, April 24, 1988.

11. Mr. McBrayer testified that Mr. Hayes told him he would try to come to work later that afternoon.

12. Mr. Hayes did not show up for work at all on Monday, April 25, 1988.

13. Jay Rathfon, Mr. McBrayer's superior, testified that, when Mr. Hayes did not show up for work, he met with Mr. McBrayer, spoke to him about his concerns regarding Mr. Hayes' drinking, and agreed that, if Mr. Hayes was absent from work because he had been drinking, Mr. McBrayer could discharge Mr. Hayes.

14. When Mr. Hayes appeared for work on Tuesday, April 26, 1988, Mr. McBrayer questioned Mr. Hayes as to the reasons why he was absent. Mr. Hayes first gave Mr. McBrayer one story, and when pressed, Mr.

Hayes changed his story and refused to verify it.

15. Mr. McBrayer then concluded that Mr. Hayes had lied to him and advised Mr. Hayes that he could resign or be fired, with his decision to be made in approximately one hour.

16. In that hour, Mr. McBrayer reviewed the morning events and his decision with Mr. Rathfon and Michael Pierce, CGOH's then Vice President of Human Resources.

17. Mr. Pierce testified that he would have arrived at a different decision but agreed that the decision made by Mr. McBrayer and approved by Mr. Rathfon was a valid decision. [4]

18. During that same time period, Mr. Pierce met with Mr. Hayes, who asked if Mr. McBrayer could do this to him. Mr. Pierce stated that, if Mr. Hayes had lied to Mr. McBrayer, he could be fired. Mr. Pierce then asked if Mr. Hayes had, in

fact, lied to Mr. McBrayer. Mr Pierce testified that Mr. Hayes admitted to him that he had, in fact, lied to Mr. McBrayer.

19. Mr. Hayes never disputed Mr. Pierce's testimony.

20. Following this discussion, Mr. Hayes handed in his resignation on April 26, 1988, to be effective in 30 days.

21. During the 30-day period before his resignation would be effective, Mr. Hayes was to receive pay and benefits.

IV. THE MAY 16, 1988 DISCHARGE

22. During the week of April 25, 1988, George Strohl, Jr., President of CGOH, was out of town. During this week, Mr. Strohl called CGOH and spoke with Mr. Pierce about Mr. Hayes. Mr. Pierce assured Mr. Strohl that the decision was appropriate because Mr. Hayes had admitted to Mr. Pierce that he had lied to Mr. McBrayer.

23. By letter from Mr. Hayes to Mr. Strohl dated May 9, 1988, Mr. Hayes requested that CGOH rescind his resignation.

24. By letter to Mr. Hayes from Mr. Strohl dated May 16, 1988, CGOH converted the resignation to a discharge for improper conduct. In that letter, Mr. Strohl specifically informed Mr. Hayes that the "conduct warranting your discharge involves your admitted falsification to your superior." [5]

25. Mr. Strohl's decision to discharge Mr. Hayes was based upon only what Mr. Pierce had told Mr. Strohl about Mr. Hayes' admission of lying to Mr. McBrayer.

V. THE PRIMA FACIE CASE

26. Mr. Hayes is a black person formerly employed as the Purchasing Manager at CGOH.

27. Mr. Hayes was discharged by CGOH for his "admitted falsification" to his superior, Bert McBrayer.

28. Mr. Hayes failed to show that other similarly situated persons not in his protected category were treated more favorably than he despite their commission of comparably serious misconduct.

29. Mr. Hayes failed to show that any supervisor or manager of CGOH who lied to their superiors; whether the lie concerned a reason for being off work or about any other issue.

30. The only evidence with respect to discipline received by employees who lied to their superior came from Mr. Rathfon, who testified that he had fired a white manager who had lied to him about her processing of a CGOH telephone bill. When he discovered she had lied, she was discharged immediately.

31. Although Mr. Hayes testified that Mr. McBrayer made a statement on April 26, 1988, that, "You people have a pattern for Mondays", Mr. McBrayer denied ever having made such a statement.

32. To the extent such statement was made, it only constitutes an isolated stray remark. [6]

33. Such statement, if made, could be probative of discrimination. However, such statement does not rise to the level of direct evidence because it is not clear to what "you people" refers. Rather, resort to inference is necessary to determine whether that phrase refers to black persons, or to persons with an alcohol problem. Since it is not clear, it is not direct evidence of race discrimination.

34. Prior to April 26, 1988, Mr. McBrayer believed Mr. Hayes had a problem with alcohol.

35. Within his first three days as Director of Materials Management, Mr. McBrayer assessed Mr. Hayes' discipline for having the smell of alcohol on his person while at work on November 26, 1986.

36. On December 10, 1986, Mr. McBrayer disciplined Mr. Hayes for again having the smell of alcohol on his person.

37. In 1987, Mr. McBrayer noticed some improvement in this deficiency and noted, in Mr. Hayes' 1987 performance evaluation that "personal problems have been discussed and have improved."

38. However, on or about January 25, 1988, Mr. McBrayer issued Mr. Hayes a final notice for his alcohol problem with a warning that, if it occurred again, Mr. Hayes would be fired. [7]

39. When Mr. Hayes asked Mr. McBrayer if he knew of any rehabilitation programs, Mr. McBrayer referred him to Mr. Pierce.

40. Mr. Pierce testified that he spoke with Mr. Hayes regarding insurance coverage for the treatment of alcohol.

41. Mr. Hayes did not follow up on any recommendations concerning rehabilitation.

42. Mr. Hayes did not show that race played a motivating factor in Mr. Strohl's decision to discharge him.

43. There was no reason for Mr. Pierce to fabricate the conversation he had with Mr. Hayes on April 26, 1988. In fact, it appears that Mr. Pierce preferred not to discharge Mr. Hayes. Further, at the time he testified, Mr. Pierce was separated from CGOH under threat of discharge. This, I find that Mr. Hayes did, in fact, admit to Mr. Pierce that he lied to Mr. McBrayer.

VI. LACK OF MITIGATION

44. An advertisement for a materials management director at Albert Einstein Medical Center appeared in the October and

November 1988 editions of the Hospital Materials Management periodical.

45. An advertisement for a purchasing manager at Hahnemann University appeared in the April 1989 edition of the Hospital Materials Management periodical.

46. An advertisement for a manager in the central services department at the Fitzgerald Mercy Hospital appeared in [8] the July 1989 edition of the Hospital Materials Management periodical.

47. An advertisement for a purchasing agent at Wasserott's appeared in the July 1989 edition of the Hospital Materials Management periodical.

48. An advertisement for buyers in the materials management department of the University of Maryland appeared in the September 1989 edition of the Hospital Materials Management periodical.

49. An advertisement for manager in the central services department of the

Fitzgerald Mercy Hospital appeared in the September 1989 edition of the Hospital Materials Management periodical.

50. An advertisement for a director of materials management for Lancaster General Hospital appeared in the June 30, 1989 edition of the Modern Healthcare periodical.

51. An advertisement for a materials management director for Memorial Hospital appeared in the December 29, 1989 and January 8, 1990 editions of the Modern Healthcare periodical.

52. An advertisement for a purchasing buyer for Geisinger Medical Center appeared in the June 12, 1988 edition of the Sunday Patriot News.

53. An advertisement for a purchasing manager appeared in the July 31, 1988 edition of the Sunday Patriot News. [9]

54. An advertisement for an assistant director of materials management at

Polyclinic Medical Center appeared in the September 11, 1988 edition of the Sunday Patriot News.

55. An advertisement for a manager of purchasing at the Milton S. Hershey Medical Center appeared in the December 18, 1988 edition of the Sunday Patriot News.

56. An advertisement for a materials manager appeared in the August 6, 1989 edition of the Sunday Patriot News.

57. An advertisement for a purchasing manager for Waynesboro Hospital appeared in the August 20, 1989 edition of the Sunday Patriot News.

58. An advertisement for a director of materials management for Blair Memorial Hospital appeared in the August 26, 1990 edition of the Sunday Patriot News.

59. An advertisement for a purchasing manager at Sterling Drug, Inc. appeared in

the September 9, 1990 edition of the Sunday Patriot News.

60. Mr. Hayes testified that he did not respond to any of the aforementioned advertisement, and he failed to offer any reasonable justification for not doing so.

/S/

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Of Counsel:

MORGAN, LEWIS & BOCKIUS

Dated: October 19, 1990

Question: Wasn't that true? Answer: Yes. Aren't those questions and answers there sir?

A Excuse me, I don't understand the question. Wasn't it true? I understand that question to be was that not what he said. Yes, this is what he said.

Q Are those questions and answers not in your deposition, sir?

A The answer wasn't that true states that, yes, this is what he said, not was what he said true.

Q Now, Mr. Hayes, after you met with Mr. McBrayer on the morning of Tuesday you had an opportunity to meet with Mr. Pierce, did you not?

A Yes.

Q And when you met with Mr. Pierce you were very upset, weren't you?

A Yes.

Q Mr. Pierce has described you as crying, shaking, you couldn't think straight, something to that effect. Does that fairly well describe you when you met with Mr. Pierce?

A I think so.

Q And at that meeting with Mr. Pierce did you not in fact say to him that you had lied to Mr. McBrayer?

A No.

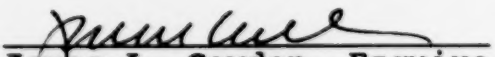
Q At no time during that meeting with Mr. Pierce did you offer to have your explanation of why you were off on Monday

CERTIFICATE OF SERVICE

I, JAMES L. COWDEN, ESQUIRE, certify that I have this day served two (2) true and correct copies of the foregoing document by first class mail, postage prepaid, on the following person, addressed as follows:

Vincent Candiello, Esquire
MORGAN, LEWIS & BOCKIUS
800 North Third Street
Harrisburg, PA 17102

STROKOFF & COWDEN, PC



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DATED:

27 Nov 1991

Supreme Court, U.S.
FILED
DEC 23 1991
OFFICE OF THE CLERK

No. 91-895

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

TALMADGE W. HAYES,
Petitioner,

v.

COMMUNITY GENERAL OSTEOPATHIC HOSPITAL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF OF RESPONDENT COMMUNITY GENERAL OSTEOPATHIC HOSPITAL IN OPPOSITION

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Dated: December 23, 1991

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Should *certiorari* be granted on whether *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), precludes a discriminatory discharge action premised upon 42 U.S.C. § 1981 given that all courts of appeals considering the issue are in agreement that such a claim is precluded?

2. Is there any special and important reason for granting *certiorari* regarding Petitioner's evidentiary issue given that the appellate court independently determined that substantial evidence supported each of the district court's critical findings of fact and conclusions of law?

PARTIES BELOW

Petitioner Talmadge W. Hayes was the plaintiff in the district court and the appellant in the court of appeals. Respondent Community General Osteopathic Hospital was the defendant in the distict court and appellee in the court of appeals.

The Community Osteopathic Hospital Foundation is the parent corporation of Respondent. The Community Osteopathic Hospital Foundation has two other subsidiaries: Londonderry Properties, Inc. and Arlington Services, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-895

TALMADGE W. HAYES,

Petitioner,

v.

COMMUNITY GENERAL OSTEOPATHIC HOSPITAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF RESPONDENT COMMUNITY GENERAL OSTEOPATHIC HOSPITAL IN OPPOSITION

Respondent Community General Osteopathic Hospital respectfully requests that the Court deny the Petition for Writ of Certiorari, seeking review of the judgment of the United States Court of Appeals for the Third Circuit entered on August 8, 1991.

COUNTERSTATEMENT OF THE CASE

Petitioner Talmadge W. Hayes ("Hayes" or "Petitioner") was employed by Respondent Community General Osteopathic Hospital ("CGOH") as a Purchasing Manager until May 16, 1988, when he was discharged for lying to his supervisor. Hayes then filed his Complaint

on November 8, 1989. The Complaint alleged that Hayes was discriminatorily discharged because of his race and that he was denied an internal grievance hearing on the same basis as that provided to Caucasians. These allegations were premised on Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), and 42 U.S.C. § 1981 (1982).

CGOH moved to dismiss the Section 1981 allegations on the ground that the alleged conduct did not relate to Hayes' right to make or enforce contracts within the meaning of that statute. The district court then dismissed the discharge claim under Section 1981 but permitted Hayes to proceed on the internal grievance hearing theory. Once discovery was completed, CGOH moved for partial summary judgment on the internal grievance hearing theory and to strike Hayes' jury demand. The district court granted those motions on September 26, 1990. The order striking the jury demand and internal grievance hearing theory has not been appealed.

On October 1 and 2, 1990, a bench trial with an advisory jury was held on the discriminatory discharge count raised under Title VII. The district court held, on October 26, 1990, that Hayes had failed to prove race discrimination by a preponderance of the evidence and entered judgment in favor of CGOH.

On appeal, the Court of Appeals for the Third Circuit affirmed in all respects. The appellate court held that, in light of *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), and the holdings of ten other courts of appeals, a claim of discriminatory discharge was not cognizable under Section 1981. The Third Circuit also held that the almost verbatim adoption of CGOH's proposed findings of fact did not require a heightened scrutiny; that the clearly erroneous standard was appropriate; and that the district court's findings of fact were supported, with one exception, by substantial evidence on the record. Significantly, the appellate court correctly concluded that the only

clearly erroneous finding of fact constituted harmless error because of a distinct credibility finding adverse to Petitioner.

SUMMARY OF REASONS FOR DENYING THE WRIT

The Petition for Writ of Certiorari should be denied because the Third Circuit and district court correctly applied the law governing Section 1981 as it relates to discharges, and the Third Circuit correctly applied the standard of review applicable to a district court's factual findings. Moreover, there are no compelling or important reasons for granting *certiorari*, as this case turns on its own facts and is of importance only to the litigants. The Petition seeks only to have the Court review evidence previously presented and to revisit well-settled principles of law. Such a request does not warrant the exercise of the Court's discretionary power of review.

REASONS FOR DENYING THE WRIT

I. THE PETITION SHOULD BE DENIED BECAUSE THE LAW CONCERNING THE APPLICATION OF SECTION 1981 TO AN ALLEGEDLY DISCRIMINATORY DISCHARGE IS WELL SETTLED.

A petition for a writ of certiorari should be granted only if there are "special and important reasons therefore." Sup. Ct. R. 10.1. None of the indicia for granting *certiorari* are present in the instant matter. With regard to the first issue Petitioner advances, there is no conflict among the courts of appeals, *see* Sup. Ct. R. 10.1(a), and the applicable law has been settled since the Court decided *Patterson*.

The relevant statute at issue here is 42 U.S.C. § 1981. This statute provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be

> parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by White citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

In *Patterson*, the Court held "that provision does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations." 491 U.S. at 171. In the opinion below, the Third Circuit correctly noted that *Patterson* did not address specifically whether an allegedly discriminatory discharge continued to be cognizable under Section 1981. However, the appellate court found "*Patterson's* direction clear and [held] that such discharge is not actionable under § 1981. Like on-the-job harassment, job termination is clearly 'post-formation conduct' implicating performance of an existing employment contract, but not formation of such a contract." *Hayes v. Community General Osteopathic Hospital*, 940 F.2d 54, 56 (3d Cir. 1991) (citations and footnote omitted). Accordingly, the appellate court affirmed the district court's dismissal of Petitioner's Section 1981 allegations.

Since the *Patterson* decision, the Courts of Appeals for the District of Columbia,[1] the Second,[2] Fourth,[3] Fifth,[4]

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[1] *See Gersman v. Group Health Ass'n, Inc.*, 931 F.2d 1565, 1571 (D.C. Cir. 1991), *petition for cert. filed* (Nov. 1, 1991) (No. 91-724).

[2] *See Patterson v. Intercoast Management of Hartford, Inc.*, 918 F.2d 12, 13-14 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1686 (1991).

[3] *See Williams v. First Union National Bank*, 920 F.2d 232, 233-34 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 2259 (1991).

[4] *See Carter v. South Central Bell*, 912 F.2d 832, 839 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 2916 (1991).

Sixth,[5] Seventh,[6] Eighth,[7] Ninth,[8] Tenth,[9] and Eleventh[10] Circuits all have held that an allegedly discriminatory discharge does not constitute the making or enforcement of a contract within the meaning of Section 1981.[11] The decisions of the Court of Appeals for the Third Circuit and district court in this case are in accord with this now long line of cases.

Thus, the law is not unsettled and there are no "special and important reasons" for the Court to exercise its discretionary power of review. Accordingly, CGOH respectfully requests the Court to deny the Petition on this ground.

II. THE APPLICATION OF THE "CLEARLY ERRONEOUS" STANDARD TO THE DISTRICT COURT'S FINDINGS OF FACT IS OF IMPORTANCE ONLY TO THESE LITIGANTS AND IS IN ACCORD WITH APPLICABLE PRECEDENT.

The remaining issue in the instant Petition constitutes a simple case of a disappointed litigant's differential view

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[5] *See Prather v. Dayton Power and Light Co.*, 918 F.2d 1255, 1256-58 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 2889 (1991).

[6] *See McKnight v. General Motors Corp.*, 908 F.2d 104, 108-10 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1306 (1991).

[7] *See Taggart v. Jefferson County Child Support Enforcement Unit*, 935 F.2d 947 (8th Cir. 1991).

[8] *See Courtney v. Canyon Television and Appliance Rental, Inc.*, 899 F.2d 845, 949 (9th Cir. 1990).

[9] *See Trujillo v. Grand Junction Regional Center*, 928 F.2d 973, 976 (10th Cir. 1991).

[10] *See Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1520 (11th Cir. 1991).

[11] The Court of Appeals for the First Circuit has not yet ruled on this issue, and declined to reach the question in the somewhat analogous context of a university's suspension of a student. *See Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 16-17 (1st Cir. 1989).

of adverse findings. Despite Hayes' protestations to the contrary, there is no doubt that the clearly erroneous standard applies to the factual findings of a district court.

Rule 52 of the Federal Rules of Civil Procedure specifies:

> *In all actions tried upon the facts* without a jury or *with an advisory jury*, the court shall find the facts specially and state separately its conclusions of law thereon . . . . *Findings of fact*, whether based on oral or documentary evidence, *shall not be set aside unless clearly erroneous*, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

(emphasis added). The unambiguous language of the Rule indicates that the Third Circuit was entirely correct in applying the clearly erroneous standard on appeal.

In effect, Hayes' contrary arguments are a *non sequitur*. Here, the court of appeals held that "[s]ubstantial evidence in the record" supported the conclusions of the district court. 940 F.2d at 58. Consequently, there simply was no basis for reversing the findings and conclusions of the district court.

In sum, Petitioner's contentions raise no substantial legal question. An advisory jury is just that and nothing more. A district court may accept or reject an advisory jury's recommendation. *See Hyde Properties v. McCoy*, 507 F.2d 301 (6th Cir. 1974); *Sheila's Shine Products, Inc. v. Sheila Shine, Inc.*, 486 F.2d 114, 122 (5th Cir. 1973); *Chicago & Northwestern Ry. Co. v. Minnesota Transfer Ry. Co.*, 371 F.2d 129, 130 (8th Cir. 1967). Accordingly, the fact that a district court rejects the recommendations of an advisory jury does change the applicable standard of review. As the Third Circuit correctly concluded, the district court's findings of fact and conclusions of law are reviewed under the clearly erroneous standard. *See Marvel v. United States*, 719 F.2d

1507, 1515 (10th Cir. 1983); *Interstate Commerce Comm'n v. Southwest Marketing Ass'n*, 315 F. Supp. 805 (N.D. Tex. 1970); Fed. R. Civ. P. 52(a). By arguing for a heightened standard of review and ignoring that each critical finding was supported by substantial evidence of record, Hayes virtually concedes that the district court's findings were not clearly erroneous and should be upheld on appeal.

Similarly, the court of appeals correctly held that the adoption by the district court of CGOH's proposed findings of fact does not warrant heightened scrutiny on appeal. In *Anderson v. Bessemer City*, 470 U.S. 564, 572 (1985), the Court stated that "even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." The same conclusion was reached in *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964), where the district court adopted verbatim appellees' findings and conclusions. There, the Court held: "Those findings, though not the product of the workings of the district judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by the evidence." 376 U.S. at 656.

In the matter at hand, the court of appeals specifically found that the district court's decision was supported by substantial evidence in the record and passed muster under the clearly erroneous standard. Indeed, the fact that the district court disagreed with the findings of the advisory jury is persuasive evidence that the district court thoroughly considered the evidence and the credibility of witnesses.

Undeterred, Hayes maintains that the Third Circuit erred in its conclusion that it was harmless error for the district court to find that Hayes had not challenged CGOH's Vice President of Human Resource's testimony that Hayes had admitted lying concerning the reason for his absence. *See* 940 F.2d at 57-58. In essence, Peti-

tioner is asking the Court to re-examine the district court's credibility findings. As the Third Circuit found, "the district court made a distinct, specific finding that [CGOH]'s Vice President of Human Resources 'testified truthfully' that Hayes admitted lying to his supervisor." 940 F.2d at 58; *see also* Finding of Fact No. 31. Whether Hayes challenged that testimony, the district court, nevertheless, made a credibility finding that rejected his challenge. Clearly then, this issue does not implicate disputed legal principles.

Under *Anderson* and Rule 52, the district court's decision to credit the testimony of the Vice President should only be reviewed for clear error. *See Anderson*, 470 U.S. at 573; Fed. R. Civ. P. 52(a). The court of appeals was entirely correct in refusing to re-weigh the evidence supporting this conclusion because "[t]he reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court." *Anderson*, 470 U.S. at 573. For the Third Circuit to reverse a credibility finding which was otherwise supported by the record, *see* 940 F.2d at 58, would be to overstep the bounds of appellate review clearly drawn by *Anderson*.

Reviewing the quantum and quality of the evidence supporting Hayes' dismissal was the responsibility of the district court particularly where, as here, the underlying question focused on discriminatory intent. Indeed, the Court has traditionally accorded great deference to findings regarding discriminatory intent. *See Hernandez v. New York*, 111 S. Ct. 1859, 1868 (1991) (citing *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985) and *Batson v. Kentucky*, 476 U.S. 79, 98 n.21 (1986)).

While Hayes argues that the district court could have somehow performed a more thorough job, this assertion does not provide a basis for granting *certiorari*. As the Court consistently has held, it does not "grant a certiorari to review evidence and discuss specific facts." *United*

States v. Johnston, 268 U.S. 220, 227 (1925). Simply stated, the evidentiary issue presented here is of importance solely to the litigants in this case. There are no special or important reasons favoring an exercise of the Court's discretionary power of review for this singular purpose. In short, the Court does not sit "for the benefit of [this] particular litigant[]." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955).

CONCLUSION

For all of the foregoing reasons, Respondent respectfully submits that the Petition should be denied.

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